

The Honorable Richard A. Jones

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

GABRIELLA KERTESZ,
pro se and all other similarly situated
citizens,

Plaintiff,

v.

BOB FERGUSON,

Defendant.

NO. 2:20-CV-00372-RAJ-BAT

DEFENDANT'S REPLY TO
PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION TO
DISMISS

Defendant, BOB FERGUSON, respectfully submits the following Reply to the Plaintiff's Response to Defendant's Motion to Dismiss.

I. AUTHORITY AND ARGUMENT

A. The Complaint Must Be Dismissed Because Plaintiff Lacks Article III Standing Necessary to Invoke This Court's Jurisdiction

Plaintiff's Response further shows that Plaintiff lacks Article III standing. A plaintiff must satisfy the threshold requirements of Article III to invoke the jurisdiction of the federal courts. *Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983). These requirements are: (1) the plaintiff must have suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent;" (2) "there must be a causal connection between the injury and the conduct complained of;" and (3) it must be likely, not hypothetical, that the plaintiff's injury will be redressed by a favorable decision. *Lujan v. Def. of Wildlife*, 504 U.S.

1 555, 560–61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

2 In her response, Plaintiff provides additional detail not stated in the Complaint about
3 her “mistreatment at the hands of the healthcare sector.” Response to Defendant’s Motion to
4 Dismiss (Response) at 4, Dkt. No. 14. Plaintiff alleges that Swedish Hospital performed a CT
5 scan on Plaintiff’s daughter without fully informing the Plaintiff of the risks involved. *Id.*

6 The Defendant will not speculate as to the extent of harm suffered by Plaintiff.
7 However, Plaintiff has not articulated any concrete harm that is traceable to the conduct of the
8 Defendant. Any harm suffered by the Plaintiff appears to relate to the actions underlying her
9 medical malpractice claim. As this claim has already been litigated, it is unclear how the
10 requested relief would remedy the alleged harm.

11 Furthermore, in her Response, the Plaintiff acknowledges she is not seeking relief for a
12 personal harm. Plaintiff states that she “is not in federal court to seek [a] remedy for the harm
13 that was done to her, but to plead for an intervention that will prevent harm to others.” *Id.*
14 Plaintiff’s own words demonstrate that Plaintiff lacks Article III standing. Plaintiff has not
15 carried her burden of establishing Article III standing, and the Complaint should be dismissed
16 under Fed. R. Civ. Proc. 12(b)(1).

17 **B. The Complaint Must Be Dismissed Because Attorney General Ferguson Is A State**
18 **Official Acting in His Official Capacity**

19 Plaintiff’s claim that Defendant violated 42 U.S.C. § 1983 must fail because Attorney
20 General Ferguson is a state official acting in his official capacity. A state agency is not a
21 “person” for purposes of 42 U.S.C. § 1983, nor is a state official acting in his or her official
22 capacity. *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed.
23 2d 45 (1989).

24 In her Response, the Plaintiff now alleges for the first time that this lawsuit is against
25 Attorney General Ferguson in his individual capacity. Relying on *Ex Parte Young*, 209 U.S.
26 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), Plaintiff asserts that the Defendant is subject to suit in

1 his individual capacity.

2 Official capacity suits involve the governmental entity as the real party in interest, and
 3 turn on the entity's policy or custom. *Hafer v. Malo*, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L.
 4 Ed. 2d 301 (1991). Personal capacity suits "seek to impose individual liability" on a
 5 governmental official for particular actions taken under color of state law.
 6 *Hafer*, 502 U.S. at 25.

7 Here, Plaintiff's Complaint alleges a deprivation on the basis of the state's enforcement
 8 of RCW 7.70.060. She does not name a particular action perpetrated by
 9 Attorney General Ferguson. Instead, she complains of a policy or custom of enforcing state law
 10 as written. This is consistent with an official capacity suit, not a personal capacity suit. The
 11 framing of the Plaintiff's Complaint supports this interpretation. Plaintiff identified the
 12 Defendant to be "Bob Ferguson Attorney General of Washington State." Complaint at 1, Dkt.
 13 No. 1. Plaintiff stated in her basis for jurisdiction, "By enforcing RCW 7.70.060 defendant
 14 under the color of law in his official capacity violates the 14th Amendment to the U.S.
 15 Constitution." *Id.*

16 Additionally, Plaintiff served the summons and complaint upon Attorney General
 17 Ferguson in his official capacity by leaving the summons and complaint in the office of the
 18 Attorney General with an Assistant Attorney General. *See* RCW 4.92.020. Had Plaintiff
 19 intended to name Attorney General Ferguson in his individual capacity, service upon the state
 20 in this manner would have been insufficient, and the Complaint should be dismissed for
 21 insufficient service of process under Fed. R. Civ. Proc. 12(b)(4).

22 **C. Plaintiff's Allegations Do Not Support a Claim for Relief Under 42 U.S.C. § 1983**

23 Even if Plaintiff's Complaint can proceed, she fails to provide a reasonable basis on
 24 which the Defendant acted under color of state law to deprive her of her rights.

25 Plaintiff asserts that "[t]he State plays an active role in enforcing RCW 7.70.060 in
 26 private lawsuits for the sole protection of the healthcare sector." Response at 7, Dkt. No. 14.

1 This is not the case. Chapter 7.70 RCW, the statutory scheme challenged by Plaintiff, relates to
 2 private causes of action for injuries resulting from health care. RCW 7.70.010. This statutory
 3 scheme establishes the burden of proof in medical malpractice cases as well as procedures for
 4 litigating these claims. Nothing in Chapter 7.70 RCW tasks the Office of the Attorney General,
 5 the Department of Health (DOH), or any state agency, with enforcement of this chapter. The
 6 Plaintiff can show no deprivation under color of law, because the state does not involve itself
 7 in private medical malpractice lawsuits.

8 Nonetheless, Plaintiff argues that Attorney General Ferguson is “unconstitutionally
 9 enforcing RCW 7.70.060” by advising the DOH to uniformly reject all informed consent
 10 violation complaints. Response at 7–8, Dkt. No. 14. The DOH regulates health care
 11 professionals by way of the Uniform Disciplinary Act (UDA), Chapter 18.130 RCW. Under
 12 the UDA, any individual may submit a complaint to the disciplining authority alleging a
 13 license holder has committed unprofessional conduct, at which point the disciplining authority
 14 will decide whether or not to investigate the complaint. RCW 18.130.080(1)(a), (2).
 15 RCW 18.130.180 defines the actions that constitute unprofessional conduct. Any license holder
 16 who is found to have committed unprofessional conduct can be subject to professional
 17 discipline. RCW 18.130.060.

18 Plaintiff appears to argue that the DOH has violated 42 U.S.C. § 1983 by not taking
 19 disciplinary action against health professionals who do not use informed consent forms.
 20 However, a complaint alleging unprofessional conduct must allege a violation of one of the
 21 subsections of RCW 18.130.180. The DOH disciplinary authorities cannot take disciplinary
 22 action without a complaint or evidence of unprofessional conduct. Therefore, the DOH must
 23 close complaints that do not support an allegation that a health care provider engaged in
 24 unprofessional conduct. This decision depends on the particular facts alleged. The Plaintiff’s
 25 Complaint on its face does not support a claim for relief under 42 U.S.C. § 1983.

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D. Plaintiff's Allegations Are Insufficient to Support a Claim That RCW 7.70.060 is Unconstitutional

In her Response, Plaintiff asserts that "it is not the law that is lacking in Washington state, but the enforcement of it." Response at 8, Dkt. No. 14. Plaintiff appears to agree that RCW 7.70.060 is rationally related to a legitimate governmental interest. Because the Plaintiff agrees, the law is constitutional on its face, her Equal Protection Clause claim must fail.

II. CONCLUSION AND RELIEF REQUESTED

Plaintiff lacks Article III standing to invoke this Court's jurisdiction. Additionally, Plaintiff has failed to state a claim for which relief can be granted. The Defendant asks this Court to dismiss the Complaint with prejudice.

DATED this 30th day of April, 2020.

ROBERT W. FERGUSON
Attorney General



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Assistant Attorney General
Agriculture and Health Division
Attorneys for Defendant Bob Ferguson
360-586-6470

CERTIFICATE OF SERVICE


I hereby certify that on April 30, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

UNITED STATES WESTERN DISTRICT COURT CLERK
SEATTLE, WA

GABRIELLA KERTESZ
9702 1ST AVE NW
SEATTLE, WA 98117

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 30th day of April, 2020, at Tumwater, WA.


JESSICA MAY
Legal Assistant